

1500874 (Migration) [2016] AATA 3475 (2 March 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Kamala Kumari Bhattarai
CASE NUMBER:	1500874
DIBP REFERENCE(S):	CLF2013/100533
MEMBER:	Catherine Carney-Orsborn
DATE:	2 March 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 02 March 2016 at 10:02am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 2 January 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 8 May 2013 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because they were not satisfied she met the definition of spouse under section 5F of the Migration Act.
4. The applicant appeared before the Tribunal on 9 February 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the visa applicant meets the definition of spouse under section 5F of the Migration Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen by birth.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A marriage certificate is held on the Department file at folio 2. The parties were married on the 12 February 2013 at Parramatta. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
11. Below is a summary of the evidence provided at hearing by the applicant and sponsor.
12. The applicant first came to Australia in 2009. She was a spouse on a student visa. She worked in Australia and is currently working as a cleaner.
13. She has family in Nepal. She has regular contact with her family. The Tribunal asked where her ex-spouse currently is. She replied that she did not know anything about him.
14. She said she met the sponsor when she was at her friend Janne's house. She said that the sponsor was a friend of Janne's husband. They met at Janne's house. They met again several times and formed a relationship.
15. She said that the sponsor works as a structural engineer. She did not know the name of his employer. She said that he started working in March and his money goes on food, rent and bills. She said he has a car and has lunch outside. His wages go into his own account. He does not put them into their joint account. She said that the joint account was her account and he has his own personal account.
16. They have no joint assets. She said they have been in their current property since April 2015. She said they were in Merrylands for six months before that.
17. She claims they started to live together after their marriage. She said he has just said hello to her family as there is a language barrier. She claims that the sponsor has one brother he speaks to. He has three brothers and four sisters. She said he does not have a proper relationship with them. When asked why he does not have a proper relationship with his family she replied because he did not work and they helped him, she did not clarify or expand on this. She said he has four sisters and three brothers and one brother lives at Bankstown.
18. She said he is the eldest in his family and clarified that all his brothers and sisters are younger than him. She has not met his sisters.
19. The Tribunal asked about the applicant and sponsor's social life. She said that they sometimes go out. The Tribunal asked where they spent last Christmas. She replied they saw her niece who had a baby and spent the day with the niece. The Tribunal asked her to clarify that they both spent the day together at the nieces and she confirmed they both spent the day there.
20. The Tribunal then went through the nature of the household. The applicant said that she first lived with the sponsor after they got married. She said they lived with his brother in a two bedroom unit. She said that prior to that she lived in Auburn. She said they lived at Bankstown for about ten months. She then stated that they lived with the brother at Bankstown for about one year and ten months. They then moved to another place which was closer to her work.
21. She said she does the cooking, she said she cooks Nepalese food. The Tribunal asked what the sponsor's favourite food was and she said bar-b-cue. She said they do not have

many friends and the sponsor has no friends. The Tribunal asked why he had no friends. She replied that she did not know but maybe they moved.

22. The Tribunal said that earlier she had said they met through mutual friends. She said yes but those friends have moved to Cronulla and they do not see them anymore.
23. The Tribunal then put to the applicant issues which were set out in the Department's decision which was attached to the application for review. The Tribunal asked if there was anything she wished to say about her listing her sister as her contact when she travelled overseas and giving her sister's address even though she was married at that time to the sponsor. She replied that she was very worried at that time and her sister bought the airline ticket for her.
24. The Tribunal put to the applicant that as listed in the decision she did not know the sponsor's regular weekly movements. She replied that he just never said anything and just forgets. She did not know how long he worked. She changed her evidence and said he was on Centrelink at that time. She did not appear to know about his medical conditions. She replied that he did not take medication and she does not know anything. The Tribunal asked if he had any medical condition. She replied No.
25. The Tribunal then asked about her long term commitment to the sponsor. She stated that she was alone and he was alone and she wanted to care for him.
26. The Tribunal asked how they communicate as she does not speak fluent English. She said that before he spoke fast however now he speaks slowly to her. She said she does not understand him on the telephone.
27. The Tribunal asked what she did last Sunday. She said that she and the sponsor went with the two persons who live in the other bedroom to Minto. She said they all went together to the Temple and prayed for their new car. The Tribunal asked what religion the sponsor was. She replied he was Christian. The Tribunal asked what branch of Christianity. She replied that she did not know. She said that he sometimes goes to church. She said the church was at Lidcombe.
28. The Tribunal then took evidence from the sponsor. The sponsor said that he was born in Australia. He had four sisters and two brothers. He said he was sixth in the family.
29. He said that he does not see much of his family as they are too busy. He said that last Christmas he rang his family but there was nothing happening so he stayed at home and had a quiet day. He said he has been employed for twelve months. He was unemployed for some time. He said he had some muscular injuries from the heavy lifting.
30. He said he gets around the language barrier by speaking slowly. He said the applicant has three brothers and three sisters. He said she has a cousin at Granville who has a baby.
31. He claims they first met in July 2011. He said that the applicant knew a girl called Allison and he worked for a man called Sam. He said he worked for him for three years. He said they introduced them to each other. He said they just rang and arranged a blind date. He said he did not go to their house as it was always just business with Sam. He said Sam was not around at the time they met. He said they went out together.
32. He said she regularly speaks to her family in Nepal. He said they lived at Bankstown for about a year then moved to Merrylands. He said he pays for the rent and food. He said that they have a joint account and he uses it regularly. The Tribunal asked where his wages were paid. He said that has his own account and he transfers money to the joint account.

33. He said they have two boarders who live with them. He said they do not socialise much as a couple.
34. The Tribunal asked what he did last Sunday. He replied that with words to the effect that he went around to Kamal's (the applicant) house for dinner. The Tribunal said it was strange that he referred to the house as the applicant's house when he claims he lives with her. He gave a dismissive reply.
35. The Tribunal asked what religion the applicant was he replied she was Buddhist. He said he was Church of England and he sometimes went to the Salvation Army church at Bankstown.
36. The Tribunal then asked the applicant if she had anything she wanted to add after hearing the sponsor give his evidence. She said that she was a bit worried as he forgets things. She said he forgot they went to Minto.
37. The Tribunal then said that there were some significant inconsistencies between her evidence and the sponsors. The Tribunal said that since there were a number of inconsistencies a letter would be sent to her for her to consider those inconsistencies before she responds.
38. On 10 February the Tribunal sent a s.359A letter to the visa applicant.
39. The visa applicant responded on the 24 February 2016. The Tribunal considered that response.
40. The visa applicant and sponsor claim to have formed a relationship in October 2011 and married in 2013. They claim to have a joint account however her evidence is that she uses this account and he does not put any of his money in this account. They maintain separate accounts. The visa applicant said the sponsor pays for rent, food and bills. No persuasive independent evidence was provided to corroborate her assertion. They have no joint ownership of assets or joint liabilities. No evidence of any saving towards a common goal was provided.
41. The visa applicant did not know the name of the sponsor's employer and was vague about his work. She was confused about his work history and when he was on centrelink and when working. The Tribunal would expect that a couple who claim to be in a relationship since 2011 would have some joint financial aspects to their relationship. After considering the evidence provided by the visa applicant and sponsor the Tribunal is not satisfied that there is persuasive evidence of any joint sharing of household expenses.
42. The visa applicant provided little in the way of evidence in relation to a household they have established. At the hearing they claimed they lived together however when queried about where the sponsor spent recent time he referred to "Kamal's house".
43. The visa applicant provided a copy of a joint rental ledger from April 2015. The application was lodged with the department on 8 May 2013 and a decision was made in January 2015 not to grant the visa. Prior to the joint rental ledger there was no convincing evidence of a household being formed. The parties provided photographs of the two of them together with some third parties and same statements of support from the visa applicant's friend. The Tribunal is satisfied that the parties are known to each other and that the visa applicant's friends are supportive of the visa applicant however the evidence provided is not sufficient evidence to show the nature of the claimed household.
44. The Tribunal accepts that the visa applicant and sponsor have had some joint social interaction with the visa applicant's friends and the sponsor's brother. The visa applicant

produced photographs to show this interaction. While the Tribunal is satisfied that the visa applicant are known to each other and could have spent some time together the Tribunal is not satisfied that they are in a spousal relationship.

45. The parties claim to be in a committed relationship since 2011 however when the visa applicant travelled overseas in 2013 she listed, on her passenger card, her brother-in-law as her emergency contact and her sister's address. At hearing she this was because her sister bought the tickets. She said she was worried at the time. The Tribunal put to her that she did not appear to know the sponsor's regular commitments such as when he had to report to Centrelink. She was vague on his work details and did not know his employer. She did not know his health issues. When these issues were put to her she responded he forgets to tell her and then she changed her evidence to accord with documentary evidence.
46. The visa applicant was not aware of any health issues of the sponsor. The sponsor said he suffered from muscular issues due to heavy lifting at work. When this was put to her pursuant to s359A she stated that he used to have muscular issues but she did not know about this and he did not have health problem since they were together. The Tribunal does not accept this as plausible as their evidence is that they have been together since 2011 and he was on Centrelink during that time and suffered health issues.
47. In relation to the sponsor giving a different account of where they spent Christmas and the Sunday before the hearing the visa applicant said that he forgot. She responded to the numerous issues and inconsistencies including about important events such as Christmas and a visit to the Temple that the sponsor simply forgot and had a problem with his memory. She then provided new photographs of them at the temple which she claims was the Sunday referred to. The photograph provided was undated and as such the Tribunal does not accept it as evidence that they were at the temple together on the date in question and the sponsor simply forgot.
48. The sponsor holds down a job there was no medical evidence provided which would indicate he had a problem with his memory. The Tribunal does not accept the visa applicant's explanation that he gave differing accounts of where he had spent those important occasions as he had memory problems.
49. The visa applicant stated that she thought the sponsor was the eldest son because the sponsor has no connection with his family. The Tribunal does not accept this as a convincing explanation of why the visa applicant did not know the sponsor's placement in his family. Given the visa applicant claims to have lived with the sponsor and his brother for a period of time the Tribunal does not accept this as an explanation of why the visa applicant did not know basic information about the sponsor's family situation. The sponsor gave an incorrect description of the visa applicant's family make-up. The visa applicant responded that this was because she forgot to put one sister on the application. The Tribunal does not accept that the application form would be the sponsor's source of information about the visa applicant's family.
50. Neither the sponsor nor the visa applicant knew the religion of each other. The sponsor said the visa applicant was Buddhist and the visa applicant said she was not sure however he attended church at Lidcombe. Neither assertion was correct. When this was put to the visa applicant she responded that this was because there is a tolerance in Hindu to Buddhist and she has a statue of Buddha at home. In relation to the sponsor's religion she responded that she did not know about Christianity and she does not accompany him to church.
51. The Tribunal does not accept that someone who claims to have been in a relationship since 2011 would not know basic details such as family make-up and religion.

52. The visa applicant and sponsor gave different accounts of how they met. Their oral evidence was inconsistent with each other and the written statements. The sponsor said that they met on a blind date set up by Sam. He said that they never met at the friend's house. The sponsor gave a different name for the friend who introduced them and a different name for the friend's husband who it was claimed was the sponsor's work friend. The visa applicant claimed they met several times at her friend's house and formed an attachment.
53. When the issues were put to the visa applicant she responded that the sponsor had memory problems, has forgotten about their introduction as he had not seen the couple for some time or changed her evidence a further time.
54. The Tribunal would accept that persons could get some details incorrect however the number of inconsistencies is such that the Tribunal has formed the view that the visa applicant and sponsor have manufactured evidence to assist the application.
55. The Tribunal finds they are not credible witnesses.
56. After considering all the evidence provided the Tribunal is not satisfied that the parties have a mutual commitment to a shared life to the exclusion of others are in a genuine and continuing relationship or live together as spouses.
57. Given these findings the Tribunal is not satisfied that at the time the visa application was made or the time of this decision the parties were in a spousal relationship.
58. Therefore the applicant does not meet cl.820.211(2)(a) or cl.820.221.
59. There is nothing before the Tribunal to indicate that the visa applicant meets any of the alternative criteria in cl.820.211 or cl.820.221.
60. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

61. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Catherine Carney-Orsborn
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).